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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

TIMOTHY CHARLES PALMES,

Petitioner

-vs-

STATE OF FLORIDA,

Respondent.

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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IN THE SUPREME COURT OF THE UNITED STATES

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TIMOTHY CHARLES PALMES,

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-vs-

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts those portions of the Petition for Writ of Certiorari setting forth the Citations to the Opinions Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on pages one through two of the Petition.

Respondent does not accept Petitioner's Questions Presented, in that said questions are argumentative and do not objectively present a concise issue to be reviewed.

Respondent does not accept Petitioner's statement as to How the Federal Questions Were Raised and Decided Below. Specifically, Petitioner urged to the Florida Supreme Court on direct appeal that the trial court erred in denying his Motion to Suppress on two grounds: 1) that Petitioner's confession on October 29, 1977, came one day after Petitioner was indicted for the crime charged, and therefore, a very damaging confession

was obtained from Petitioner in the absence of counsel contrary to Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); and 2)that the totality of the evidence presented failed to demonstrate that Petitioner freely and voluntarily waived his right to counsel and therefore, his confession was inadmissible. The Supreme Court in reviewing the issues presented concluded that after repeated Miranda warnings as to his right to counsel and to have counsel present during questioning, Petitioner made a recorded confession which took place at his own request.

As to Petitioner's second issue pertaining to whether the trial court wrongfully limited evidence before the jury regarding the question as to the voluntariness of Petitioner's confession, the Florida Supreme Court concluded that although error occurred, the totality of the circumstances did not result in reversible error.

The third question presented was whether Petitioner was entitled to a jury instruction regarding accessory after the fact. The Florida Supreme Court in reviewing this issue concluded that while it is axiomatic that a defendant is entitled to a jury instruction on the theory of his defense, the issue before the Florida Supreme Court was a State question as to whether accessory after the fact is a lesser included offense to the crime of murder in the first degree. The Supreme Court in deciding said issue concluded:

> Since the jury could not legally convict the defendant of accessory after the fact, no purpose would be served by requiring that they be instructed on the charge. Therefore, the court did not err in refusing to instruct the jury about accessory after the fact either as a defense or as a lesser included offense.

[Palmes v. State, 397 So.2d 648, 652 (Fla. 1981)]

QUESTIONS PRESENTED

I.

WHETHER PETITIONER INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL AND HIS RIGHT AGAINST SELF-INCRIMINATION WHERE PETITIONER CONFESSED TO THE CRIME CHARGED AFTER BEING GIVEN MIRANDA WARNINGS WITHOUT THE PRESENCE OF COUNSEL.

II.

WHETHER THE STATE TRIAL COURT'S PRE-TRIAL HEARING DETERMINATION AS TO THE VOLUNTARINESS OF PETITIONER'S CONFESSION LIMITS THE REVIEW BY THE JURY AS TO THE VOLUNTARINESS ISSUE WITH A FULL HEARING OF ALL RELEVANT EVIDENCE.

III.

WHETHER PETITIONER WAS ENTITLED TO A JURY INSTRUCTION ON ACCESSORY AFTER THE FACT BASED ON THE CRIME CHARGED AND THE EVIDENCE PRESENTED AT TRIAL.

STATEMENT OF THE CASE

Respondent accepts those portions of the Statement of the Case set out by Petitioner in his Petition for Writ of Certiorari which are not argumentative. Respondent would invite this Court to review the Statement of Facts as set forth by the Florida Supreme Court in Palmes v. State, 397 So.2d 641 (Fla. 1981) which provides:

> Appellant lived in an apartment with his girlfriend, Jane Albert, her daughter, Stephanie, and a friend, Ronald Straight. The Appellant became acquainted with Ms. Albert's employer, James Stone. The evidence shows that Appellant, Albert, and Straight plotted the murder and robbery of Stone.
>
> On October 3, 1976, Appellant, Straight, and Albert purchased lumber, hardware, and cement from which Appellant built a box large enough to hold a man's body. The next day, Albert told her employer that a girl named Nancy was waiting for him at the apartment. She then called Appellant to let him know that Stone was on his way. Apellant told Stephanie to answer the door and tell Mr. Stone that Nancy was waiting in the back room. Ronald Straight waited behind the front door with a gun. After Stone entered the apartment, Straight directed him to the back bedroom where Appellant was waiting. The two men then bound Stone's hands and feet with wire and taped his mouth. They placed a garbage bag over his head and hit him with a hammer and stabbed him approximately 18 times. This sequence of events took about half an hour. At one point, Appellant had the child, Stephanie, come into the room and observe the victim lying in the burial box, mortally wounded.
>
> The next day, Appellant and Straight moved their possessions, together with the box containing the body, out of the apartment and into a rental truck. They took possession of the victim's watch, credit cards, and car. Albert took about $3100 in cash from Stone's furniture store. They spent the night at a motel.

The next day, Appellant and Straight drove the rental truck to the Buckman Bridge and threw the box into the St. John's River. The Appellant, Straight, Albert, and her daughter fled to California in the victim's automobile.

Police apprehended them in California. Appellant was brought back to Flroida and placed in the Duval County Jail. On October 22, 1976, police officers advised him of his constitutional rights and questioned him. On October 24, 1976, the officers again advised Appellant of his constitutional rights and interrogated him further. They read to him excerpts from a statement made by Jane Albert. He refused to make any statements until after he had spoken to her. Although he declined to sign a written waiver of his rights, he did not request an attorney and he voluntarily answered questions. Afterwards, he showed police officers the place on the bridge where the body was dropped. On October 28, 1976, an indictment was returned accusing Appellant of murder in the first degree. On October 29, the Appellant asked to see the investigating officers. After again being advised of his rights, the Appellant specifically stated that he did not want to see a lawyer. He signed a waiver and made a detailed statement of his participation in the murder. The statement was recorded and signed.

At Appellant's first appearance on October 23, 1976, the judge entered an order appointing the public defender to represent him. The Office of the Public Defender never undertook representation, however, and on October 29, requested and was granted permission to withdraw from representation on the grounds of conflict of interest. Appellant never met with a representative of that office. Throughout the course of his interrogation by police, he never asked to see an attorney.

[397 So.2d at 650-651]

REASONS FOR NOT GRANTING THE WRIT

PETITIONER WAS NOT DENIED HIS RIGHT TO ASSISTANCE OF COUNSEL AND HIS RIGHT AGAINST SELF-INCRIMINATION.

Petitioner asserts that the trial court and the Florida Supreme Court erred in denying his Motion to Suppress the confession given in that said confession was made after he was indicted and without the aid and succor of counsel. Specifically, Petitioner asserts:

> In the instant case, sheriff's office personnel had continued to interrogate the Petitioner after learning that counsel, the Public Defender's Office, had been assigned to him. They obtained an inculpatory statement after Petitioner's indictment without his being aided by counsel, cf. Massiah v. United States, 377 U.S. 201 (1964).

[Petitioner's Petition, p.7]

The Florida Supreme Court in determining this issue held:

> The Appellant contends that he was denied his Fifth and Sixth Amendment rights to due process and the assistance of counsel because his confession was obtained after indictment and in the absence of counsel. In support of this contention, he cites Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and Williams v. State, 188 So.2d 320 (Fla. 2 DCA 1966) cert.discharged 198 So.2d 21 (Fla. 1967). Massiah v. United States concerned a defendant who, after being indicted, retained a lawyer pleading not guilty and being released on bail made incriminating statements to one of his co-defendants which were detected by means of a radio transmitter. The court held the statement inadmissible under the Sixth Amendment guarantee of the right to assistance of counsel. Williams v. State was a case where the investigating officer, "knowing that the defendant . . . had been in jail for three weeks . . . that he had already been indicted for first degree murder, and that he had a lawyer and who his lawyer was, took the defendant out of his jail cell and transported him to a small room . . . in which room there was only a desk and three chairs. They went inside, closed the door, sat down . . ." 188 So.2d at

325. There, the officers solicited an incriminating statement.

These cases do not control the situation at bar. In the instant case, the defendant had already been indicted but was not yet represented by counsel. He was repeatedly advised of his right to consult with counsel and to have counsel present during questioning. The formal appointment of the Public Defender at first appearance did not initiate legal representation since nothing was done towards actually providing legal counsel. The interview at which Appellant made the recorded confession took place at his own request. He made no request to speak to an attorney and executed a written waiver of counsel. The right to counsel during questioning can be waived. Witt v. State, 342 So.2d 497, Fla. cert.denied 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 774 (1977). Investigating officers are not required to try to convince a defendant that he needs an attorney. State v. Craig, 237 So.2d 737 (Fla. 1970). We therefore hold that the court properly admitted the confession into evidence.

[397 So.2d at 651-652]

In Florida, pursuant to McDole v. State, 283 So.2d 553 (Fla. 1973), the test for admissibility of a confession is by a preponderance of the evidence. In the instant case, on all occasions when Petitioner was subject to questioning, said questioning was preceded by Miranda warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). There is no assertion to the contrary. Petitioner asserts that he was denied his right to have counsel present and his right against self-incrimination was violated. The record reflects that preceding his recorded confession, Petitioner summoned Sargeant Miles, and told Sargeant Miles that he wanted to talk to him. The record below reflects that Sargeant Miles promptly and painstakingly inquired of Petitioner as to whether he wanted counsel present at the taking of his confession.

Q. Tim, going back to the middle portion of your rights, do you understand that you have the right to talk to a lawyer?

A. Yes, I do.

Q. Do you want to talk to a lawyer?

A. No, I don't believe there is any need.

Q. Do you realize that you can have a lawyer with you during this statement or during any questioning if you so desire?

A. I understand that.

Q. Would you like for us to call an attorney for you?

A. No.

Q. Would you like for us to call the Public Defender's Office?

A. No.

Q. Would you like for us to call the judge?

A. No, I'm ready to make a statement on my own. I believe my own mind in this thing is enough. I understand what a lawyer would advise me, especially if he is planning on trying to defend me. I plan to plead guilty in the case, anyway. So, I think I'm going to go ahead and make a statement and get it off my mind now.

While Petitioner only signed a written waiver just before his recorded statement, as noted in United States v. Sawyer, 504 F.2d 878 (5th Cir. 1974) cert.denied 95 S.Ct. 1578, simply because a rights' waiver is not signed does not mean that a statement or confession is per se inadmissible. The Fifth Circuit noted in Sawyer:

> There is nothing in the circumstances surrounding Appellant's interview to indicate that his statement to the police regarding his participation in numerous robberies including that of the Biscayne Federal Savings and Loan, charged here were not voluntarily given despite the fact that he

> said he was not going to "sign anything." Appellant was repeatedly given his warnings, and, immediately before he made this statement, he read a Miranda card and said that he understood his rights.

[504 F.2d at 879]

See also, United States v. McDaniel, 463 F.2d 125 (5th Cir. 1972) cert.denied 413 U.S. 919; United States v. Devall, 462 F.2d 137 (5th Cir. 1972).

Whether Petitioner was influenced by the fact that his girlfriend, Jane Albert, was given immunity or not given immunity in the instant cause, after repeated warnings, matters not--Petitioner elected to confess to the crime charged. As noted in Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), the State cannot force counsel on anyone who wants neither the advice of counsel nor counsel's assistance.

In United States v. Deloy, 421 F.2d 900 (5th Cir. 1970), the Fifth Circuit Court found that Massiah v. United States, 377 U.S. 201 (1964) had not been violated wherein a post-indictment incriminating admission was made without the benefit of counsel's presence at said time.

> In these circumstances, we hold that Deloy's statement to Agent McNamara were admissible in evidence. He was not coerced, cajoled, or tricked into an involuntary statement. The government did not elicit, solicit, or even suggest a statement and did not otherwise treat the defendant unfairly. He was allowed to speak only after a full and adequate Miranda warning on each occasion. We do not comprehend Massiah as a sweeping mandate tainting all post-indictment statements made by a defendant without the presence of counsel. Police officers were not made constitutionally deaf to the uncoerced, insistant, and untricked statement of a properly warned defendant. Whatever the precise boundaries of the Massiah rule, here, not even the threshhold was reached.

[421 F.2d at 902-903]

In Edwards v. Arizona, ___ U.S. ___, 29 Cr.L. 3037 decided May 18, 1981, this Court, while not specifically addressing Edwards' claim that the State deprived him of his right to counsel under the Sixth and Fourteenth Amendments as construed and applied in Massiah v. United States, supra, observed:

> Miranda thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. Here, the critical fact as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions. Contrary to the holding of the state courts, Edwards insists that having exercised his right on the 19th to have counsel present during interrogation, he did not validly waive that right on the 20th. For the following reasons, we agree.

[29 Cr.L.R. at 3039]

This Court, in reversing, concluded however:

> In concluding that the fruits of the interrogation initiated by the police on January 20, could not be used against Edwards, we do not hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at trial. The Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver. Rhode Island v. Innis,

supra, makes this sufficiently clear. 446 U.S. at 298, n.2.[9]

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[9]If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly onesided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent, and found to be so under the totality of the circumstances including the necessary fact that the accused, not the police re-opened the dialogue with the authorities. . .

[29 Cr.L.R. at 3040]

See also, United States v. Massey, 550 F.2d 300 (5th Cir. 1977) and United States v. Priest, 409 F.2d 491 (5th Cir. 1969).

Respondent would submit that this Court, even in a circumstance such as Edwards v. Arizona, supra, realized that even where a defendant seeks to invoke his right to counsel during interrogation, all subsequent encounters initiated by the defendant can effectively waive any right to have counsel present at said proceedings. In the instant cause, where the record is clear that Petitioner waived his right to counsel and never sought the assistance of counsel, the confession which resulted from a meeting initiated by Petitioner with Sargeant Miles was knowingly and voluntarily made without the need for counsel or the presence of counsel at said proceedings.

Petitioner has not demonstrated that the facts of his particular case present a valid claim that his constitutional rights were thwarted. Moreover, any suggestion that he was unduly influenced or that his mental state was so impaired that he could not knowingly and voluntarily waive the presence of counsel prior to giving his recorded confession, must fall

on deaf ears. There was no claim presented to the trial court nor the Florida Supreme Court that Petitioner's mental state or his mental faculties were impaired to the extent that he could not knowingly and voluntarily waive his right to counsel. In an attempt to interject a parade of horribles in the instant cause by asserting same, Petitioner should be denied review pursuant to Cardinale v. Louisiana, 394 U.S. 437 (1969).

WHILE THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO THE ATTEMPT BY DEFENSE COUNSEL TO ELICIT FROM PETITIONER TESTIMONY CONCERNING THE CIRCUMSTANCES OF HIS CONFESSION, SAID ERROR DID NOT RESULT IN AN ERROR REQUIRING REVERSAL.

At trial, Petitioner's trial counsel attempted to elicit from Petitioner the facts and circumstances surrounding the confession that obtained. The State objected and the trial court sustained said objection. The Florida Supreme Court in reviewing this issue observed:

> It has been said that the application of this rule requires that the evidence presented to show the voluntary nature of the confession must be presented anew for the jury's consideration. (cites omitted). Thus, it must be suggested that because Appellant did not testify at the pre-trial hearing on the admissibility of the confession, he was precluded from giving his personal account of the circumstances for the jury. The functions of the judge and jury, however, are different. It is not the function of the jury to reconsider whether the confession was voluntary. (cite omitted). At trial, Appellant wanted to testify about his state of mind. In the absence of evidence of threats, promises, or the like, this testimony about state of mind would have been irrelevant at the pre-trial hearing. (cite omitted). This is because the inquiry at the pre-trial hearing on the admissibility of a confession is primarily the question of voluntariness; later, before the jury, the question is what weight to give the confession in determining guilt. The defendant's state of mind is relevant to this latter inquiry. (cites omitted). Therefore, the trial court erred in sustaining the objection.

> That the trial court's ruling was in error does not necessarily require reversal of the judgment. A judgment will not be reversed unless the error was prejudicial to the substantial rights of the Appellant. (cites omitted). This longstanding decisional rule has also been enacted as a statute. Section 924.33, Fla.Stat. (1977). Although in a capital case, this court will carefully scrutinize any error before determining it to be harmless, (cite omitted), it will not presume that there was prejudice. (cites omitted).
>
> In determining whether an erroneous ruling below caused harm to the substantial rights of the defendant, an appellate court considers all the relevant circumstances, including any curative ruling or event and the general weight and quality of the evidence. In other words, the court inquires generally whether, but for the erroneous ruling, it is likely that the result would have been different. (cites omitted). . . .
>
> While it is error not to receive in evidence "all the circumstances attending an extrajudicial confession . . . that the court may determine its admissibility and the jury consider its value" the error is harmless where substantially the same matters are presented to the jury through testimony of the same or some other witness. . .

[397 So.2d at 653-654]

Following a detailed recital of the facts and circumstances in the instant cause, Palmes v. State, 397 So.2d at 654-655, the court concluded:

> Even though the court improperly sustained the objection, defense was still able to present to the jury a substantial account of the operation of circumstances on Appellant's state of mind at the time of his confession. This is an important factor in the determination of whether the error was harmless. Furthermore, the evidence of guilt is overwhelming and it is highly unlikely that a more complete account of the circumstances of the confession would have changed the jury's evaluation of the question of guilt. We hold, therefore, that the

error was harmless.

[397 So.2d at 655-656]

In Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967), this Court noted that:

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

[386 U.S. at 22]

The court, in fashioning a harmless error/constitutional error rule concluded:

> . . . We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that the before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same results as that aimed at in our Fahy case.

[386 U.S. at 24]

In the instant cause, the Florida Supreme Court, after perusing the entire trial record, concluded that the trial court's error in granting the State's objection was diminished to the point of being insignificant in light of the testimony that was presented to the jury regarding the circumstances surrounding Petitioner making his confession. The jury was apprised of the reasons leading up to said confession and those efforts made on behalf of Petitioner to assert his rights.

Petitioner has presented no authority which would support his contention that the error in the instant case was harmful rather than harmless error. A federal question has not satisfactorily been developed herein which would entitle Petitioner to this Court's review.

PETITIONER WAS NOT ENTITLED TO A JURY INSTRUCTION AS TO ACCESSORY AFTER THE FACT WHERE HE WAS CHARGED WITH MURDER IN THE FIRST DEGREE AND THE EVIDENCE AND HIS CONFESSION DISPELLED SAME, AND ACCESSORY AFTER THE FACT IS NOT A LESSER INCLUDED OFFENSE TO THE CRIME OF MURDER IN THE FIRST DEGREE.

Petitioner's last issue for review asserts that the trial court erred in not instructing the jury as to the offense of accessory after the fact. The Florida Supreme Court in reviewing said issue observed that while it is axiomatic that a defendant is entitled to jury instruction on the theory of his defense,

> that a person committed a crime other than the one he is charged with is not a legal defense requiring a jury instruction.

[397 So.2d 652]

The Florida Supreme Court went on to say:

> Furthermore, the crime of accessory after the fact is not a lesser included offense of the crime of premeditated murder. (cite omitted). Therefore, the defendant was not entitled to an instruction on accessory after the fact as a lesser included offense. (cites omitted). If the jury had been instructed about accessory after the fact, a conviction on that charge would not be valid since it would not be supported by the facts alleged in the indictment. (cites omitted). Since the jury could not legally convict the defendant of accessory after the fact, no purpose would be served by requiring that they

> be instructed on the charge. Therefore, the court did not err in refusing to instruct the jury about accessory after the fact either as a defense or as a lesser included offense.
>
> [397 So.2d at 652]

Petitioner in the instant cause confessed to killing James Stone. The facts and circumstances developed at trial reveal that he was a full participant in this murder and that not only did he plan the murder and the robbery of Jim Stone, but helped build his coffin.

While couched in constitutional terms, Respondent would respectfully urge that the third issue before this Court is a state question to be resolved by state law and not of the magnitude reaching a federal question.

The decision relied on by Petitioner in Beck v. Alabama, 447 U.S. 625 (1980) is distinguishable from the instant cause in that first, the offense excluded in the Beck decision was or (depending on the evidence) could have been a lesser included offense of the main crime charged, and two, under Florida law, would have been a required instruction.

In the instant cause, accessory after the fact has been held in Florida to be not a lesser included offense of the crime charged. While Petitioner is entitled to instruction as to his defense theory, there was no evidence presented at trial which would support said instruction.

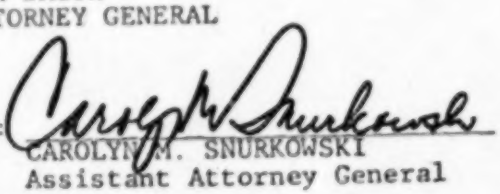
Therefore, based on the foregoing, the Florida Supreme Court did not err in concurring with the trial court's ruling that an instruction regarding accessory after the fact was inappropriate in the instant cause.

CONCLUSION

Petitioner has failed to present any federal question which would entitle him to review by this Court. Each issue raised sub judice was addressed by the Florida Supreme Court and decided correctly against Petitioner. The record below and the reasoning of the Florida Supreme Court reflects that Petitioner's confession was freely and voluntarily and knowingly given after he was informed of his constitutional rights pursuant to Miranda v. Arizona, supra, and after he repeatedly demonstrated no desire to have counsel present at the meeting initiated by Petitioner. Moreover, any error that may have occurred regarding the trial judge's limiting of defense counsel's inquiry of the Petitioner regarding the circumstances leading up to said confession was minimal at best, since as noted by the Florida Supreme Court, evidence was presented to the jury regarding same. Finally, the instructions sought to be given regarding accessory after the fact was inappropriate and not supportive of the defense's theory of the case. It was not a lesser included offense of the crime charged and for that reason alone was equally inqppropriate to the instant cause. Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted:

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